

Technical Advances in Background Checking and the Impact on Work Opportunities in New Jersey

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One of the greatest technological changes of the past decade to have an impact on New Jersey workers has been the massive rise in criminal background checks for employment screening. This report briefs findings from a mixed methods study of New Jersey criminal record policies and practices, identifies key issues in data quality and disclosure that might negatively affect workers, and examines the types of industries and workers most affected by criminal records and background checking. Technological advances in background checking have affected and will further affect work opportunities in New Jersey, particularly for those workers who have had contact with the criminal justice system, even if that contact never led to a criminal conviction or if their record was legally expunged. By empirically assessing the state of criminal record systems in New Jersey, examining the impact of criminal records on employment, and understanding the regulatory practices of the state, this report concludes with concrete recommendations for how New Jersey might ensure a broad swath of qualified workers who have some type of criminal record are not shut out of employment. By regulating criminal record information, educating employers, and ensuring workers have a pathway to expungement and a clean slate, New Jersey has an enormous opportunity to expand a diverse labor force.

Background and Scope

Shifts in background checking and employment screening technology have been affected by a set of key factors, primarily: 1) the growth of the “big data” background checking industry,

2) simultaneous growth in the number of people with criminal records, 3) issues with background check accuracy, and 4) research showing employment discrimination based on criminal records:

1. Recent estimates show that 73% of employers routinely conduct background checks (Society of Human Resources Management, 2018). These practices have changed rapidly and significantly in the “big data” revolution in ways unanticipated by researchers and policymakers. The background check industry is massive; the global market is expected to grow to a \$5.46 billion dollar industry by 2025, up from 2016’s estimated \$3.74 billion dollar industry, spurred by big data analytics, a growing workforce, expanding urban rental markets, and rising numbers of applicants per job vacancy due to online hiring (Research and Markets, 2018). There are vast amounts of data collected and shared. Experian Public Records claims its repository holds 600 million unique criminal records, covering 90% of the U.S. population. CoreLogic Background Data advertises 350 million criminal records representing defendant, alias, offense, and disposition details. BackgroundChecks.com maintains 550 million criminal records in its database. The Data Diver Criminal Index contains nearly 500 million individuals, with over 2 billion criminal records ranging across 1,400+ jurisdictions.

2. Background checks affect a significant number of potential workers. It’s estimated that 532,699 New Jerseyans have a felony conviction record (Shannon, Uggan, Schnittker, Thompson, Wakefield, & Massoglia, 2017). There are approximately 19,000 people incarcerated in New Jersey prisons (Carson, 2018), the vast majority of whom will be released. But background checks now also routinely report arrests that do not lead to charges, and criminal charges that result in a dismissal. Taking this into account, the number of impacted people increases dramatically. In 2015 alone, New Jersey police made 264,250 arrests (FBI, 2015). In

2010 (the most recent data available), New Jersey courts processed 733,201 criminal cases (National Center on State Courts, 2019). In total, this means over one million criminal records are created per year in New Jersey, most of which are available to employers and the public at large.

3. There are serious data quality problems in criminal records (Logan & Ferguson, 2016). The U.S. Department of Justice has concluded that improving criminal justice databases needs to be “rethought and reinvigorated” and that “much more needs to be done to achieve uniformity in the improvement of record quality and completeness” (U.S. Department of Justice, 2006). Common errors include incorrect social security numbers, inaccurate names, incorrect or “illogical” birth dates, mismatched identities, and the reporting of sealed or expunged records (Neighly & Emsellem, 2013). Federal analyses revealed widespread problems of data containing incomplete and inaccurate records, including lengthy backlogs (often exceeding a year) in updating and correcting criminal history information. For example, in 2012, seventeen states had over 1.8 million unprocessed or partially processed disposition forms, with over half of those states reporting that at least 30% of arrests in their records systems lacked any information on final disposition (Bureau of Justice Statistics, 2012).

4. Applicants with criminal records face significant barriers to employment (Bushway, Stoll, & Weiman, 2007). Further, criminal records have been shown to exacerbate racial inequalities. A robust set of empirical research has demonstrated that black job applicants *without* a criminal record receive less employer callbacks than white applicants *with* a criminal record (Pager, 2007). This is especially problematic given the disproportionate representation of non-white people in the criminal justice system (Brame, Bushway, Paternoster, & Turner, 2014).

However, employment has been shown to reduce recidivism (Lageson & Uggen, 2013); therefore, improving employment opportunities serves an important public safety function.

At the state level, New Jersey has taken active steps to protect workers with criminal histories from hiring discrimination through the 2015 enactment of “The Opportunity to Compete Act,” which restricts employers from asking about criminal histories (also known as “Ban the Box”). An enhanced version of the original bill was signed into law in January 2018 to cover online applications and expunged records. New Jersey has also been expanding criminal record expungement, with an enhanced expungement statute coming into effect on October 1, 2018 that expands eligibility to more residents. These reforms are designed to curtail the employment discrimination described above; however, questions remain about the creation, accuracy, and dissemination of criminal histories in the digital age.

Study Design and Methodology. This multi-methodological study empirically examines the criminal history information, background checks, and expungement processes for 98 New Jersey residents using both qualitative and quantitative approaches. The data were collected through a federally funded research grant from the National Institutes of Justice (Award No. 2017-IJ-CX-0036). Data collection proceeded in several steps. First, participants were fingerprinted and received a copy of their state criminal history report. Second, participants met with researchers to review their record in an in-depth interview that asked them to respond to, explain, and discuss their various criminal history reports. The protocol is based on a standardized medical clinical interview. Third, participants’ records were coded into a database of “criminal history events.” Fourth, research staff conducted background checks on each participant from a variety of public and private sources. Finally, if the participant was interested in seeking assistance with criminal record expungement, their case was referred directly to one

of two legal aid partners. These participants' expungement progress was continually monitored. Thus, a rich set of qualitative and quantitative data have been collected.

Key Findings. Results yielded three key findings important for understanding and reforming criminal record screening for job applicants. First, while records are technically regulated through a state repository, criminal records are routinely released by a wide set of public and private actors. Second, even official state records are replete with missing and incorrect data, which create errors in private-sector background checks. This means that while criminal record expungement reform in New Jersey is designed to allow for greater work opportunities, the current state of digital records dilutes the impact of expungement efforts. Third, several industries are specifically impacted by having a criminal record in New Jersey, namely "gig" economy work (such as Uber) and entry-level positions in health care.

Official and Unofficial Dissemination of New Jersey Records. Official criminal records are managed by the New Jersey State Police and are regulated through the New Jersey Administrative Code (N.J.A.C.) 13:59-1. This policy authorizes and limits access to criminal histories to the individual record subject and other authorized users, such as employers and criminal justice professionals. These are known across the state as "official" criminal records. However, other state and local criminal justice agencies provide many portals to access criminal record information outside this regulated system. Criminal court records are available at no cost from PROMIS/Gavel and a simple name search will reveal criminal charges and convictions. Similarly, the New Jersey Municipal Court Case Search allows users to conduct a simple name search to find municipal court actions, including a public listing of outstanding tickets. Websites operated by private companies or entities regularly repost these data into online repositories; for example, a website called Data Universe posts all Superior Court convictions in New Jersey

from February 2009 to February 2018. This database contains 334,765 records copied from the state repository (Data Universe, 2019). Countless other third-party websites also duplicate this information for public consumption, such as InstantCheckmate.com, Mugshots.com, and Pipl.com. Importantly, these websites are indexed into Google search results, so that a basic online search for an applicant would reveal criminal convictions immediately. However, these records are often outdated, incorrect, or even legally expunged. Thus, while the state regulates access to its repository of “official” conviction records, it does not regulate access to many other types of criminal records, such as arrest, charging, and conviction records as contained in police and court websites.

“Alan” is one such New Jersey resident who faced this dilemma. Alan, a governmental IT worker, was arrested in June 2017 over a missed court summons mailed to his former address. His case was dismissed by the judge, and he received an “automatic” expungement order. But two months later, Alan Googled himself and found his name posted to several government websites, including a PDF file listing weekly arrests by Newark police, which appears in Google search results of Alan’s name. Furthermore, the Essex County inmate lookup tool allows users to search for “released inmates,” which returns Alan’s booking photo and has since been re-posted to dozens of mugshot extortion websites. Alan has repeatedly contacted the state and local police via email and phone to request his information be removed, but has not received any responses. Alan is terrified his current employer will find these images and records. Prior to this arrest, he was considering seeking new employment, but has stopped his search because of his online records. “That makes it really hard. People will look you up once they know your name,” he said. “It’s not justice.”

Incomplete Criminal Record Information and Expungement Issues. A second issue is missing and incomplete information contained in official New Jersey criminal records obtained directly from the state police. Of the 98 people in the study, 15 received at least one “dispo unavailable” reported on their criminal record, and 13 received a “pending court” status on an arrest listed on their criminal record — many of which occurred over 10 years ago. These data quality issues are replicated into commercial criminal background reports and across the Internet. Furthermore, the burden is on the record subject to access their New Jersey record (including paying the \$40.66 fee), review it for mistakes or missing information, track down the original law enforcement and court records, and then serve these records back to the New Jersey State Police. After the official record is remedied, the subject must then obtain a *new* copy of their record, including fingerprinting and paying another \$40.66 fee, and then serve a copy of their new record to the dozens of consumer reporting agencies that furnish background checks. They may also attempt to serve their new record to websites that operate outside of the Fair Credit Reporting Act, but there is no regulatory arm to compel those websites and services to update their records.

These data errors have consequences outside the background check industry as well. For New Jerseyans who attempt criminal record expungement, an incomplete or incorrect criminal record will result in a failed expungement petition. “Carl,” another study participant, sought expungement for a 2005 felony conviction for unlawful possession of a weapon. He is currently working in the Newark Public School system, hired with the expectation that he would complete a criminal record expungement or risk losing his employment. He was eligible to have the record expunged after 10 years. Carl paid for and received his state record, which showed two criminal history events: an arrest and dismissal from 1998 and one arrest and conviction from 2005.

Carl's expungement petition was denied for failing to disclose a series of arrests that included a probation violation in 1998, a stalking charge in 1998, a drinking in public ticket in 2009, and a smoking in public ticket in 2009, as outlined in the judge's response memo. These are municipal violations, and because Carl was not fingerprinted when he received these tickets, his New Jersey state record did not include these arrests, and as such, he did not report them on the expungement petition. The 1998 arrests for a probation violation and a stalking offense were a mystery as he had no prior criminal history that would have put him on probation. Furthermore, the police department does not have any electronic record of Carl ever being arrested in that jurisdiction, and they no longer keep the paperwork for arrest incident reports that far back. In-person requests for court records in the New Brunswick Superior Court also did not yield any records, so Carl could not obtain any disposition paperwork for an updated expungement petition. Carl decided not to pursue the expungement, even though he was eligible and facing job loss.

But, pressure from his employer led him to attempt a second petition in 2017. This time, he received the aid of a volunteer attorney and caseworker, one of whom made an off-the-record phone call to a contact in the county probation office. This worker's database finally identified the probation violation and the stalking arrest as a violation of an order of protection the court filed in the late 1990s after a domestic dispute when Carl was a juvenile. Although he didn't actually get arrested, the incident was recorded into the family court — not the criminal court — as a violation of an order. Because of data quality issues, Carl had to wait 14 years to have his conviction expunged.

“George” faced a similar issue. He has a single felony conviction from the late 1990s and is seeking expungement for employment-related reasons. His computerized criminal history

report he requested in late 2017 shows another Newark arrest from August 1981 for burglary and possessing stolen property. The disposition on the report reads “pending court.” George has no recollection of the arrest. An inquiry to the state police was futile, as they only report fingerprint-based arrests on criminal records. The Newark Police Department and the Essex County Court do not have any records of the arrest. A few days later, George decided to drop out of the expungement process altogether to avoid having to directly challenge the record of the state.

Industry-specific Employment Barriers. Many research participants were seeking expungement and/or copies of their criminal records due to bars on employment in particular sectors — specifically “gig” economy jobs (such as Uber or Lyft) and jobs that require state board approval (such as home health aides).

A new state law enacted in 2017 designed to regulate rideshare services has had disparate and unexpected impacts for workers with minor or long-ago criminal records. “Calvin,” an Uber driver in New Jersey, woke one morning to find he could no longer open the app on his phone. Calvin has a 1989 felony drug possession conviction. Thus, he is subject to the new statewide ban on employing rideshare drivers who have been convicted of possession of a controlled substance. After two years of stable income from Uber, he said, “They gave me a slip. They were very blunt that there's a law that you can't drive for us anymore. There wasn't no warning, like another two to three weeks or whatever [of employment]; they just like cut me off completely.” There are at least 13,000 Uber drivers in New Jersey, so the impact is far reaching (Pugliese 2017).

Similarly, “Marina” has a single felony conviction from 2003 for possession of a controlled substance. Marina completed a Certified Nursing Assistant program and applied for a job as a home health aide, but was denied by the nursing board due to her conviction. She is

seeking expungement, but has not been able to guarantee from the board that an expungement will make her eligible for employment. Several other research participants, such as “Rakim,” faced similar confusion in education-based employment. After serving as a security guard at a local elementary school for 18 years, Rakim needed to renew his “license” to work for the school, seeking approval from the New Jersey Department of Education. Rakim has a low-level theft conviction from 1991 that did not bar his employment when he was hired by the school in 2000, but he was fired when a 2018 background check revealed the 1991 conviction. Further, Rakim has six “dispo unavailable” listings on his record (a result of inaccurate court data), and so he cannot file for an expungement for the conviction record. He has repeatedly visited the court to obtain the missing disposition paperwork, but the court has no record of the charges anymore. Rakim is currently unemployed after serving the school district for nearly two decades.

Policy Directives

This study of New Jersey workers in the age of “big data” background screening reveals many data quality and access to justice issues that hinder employment prospects. The state could take several important steps to begin to alleviate these barriers to work for thousands of residents:

1. Make access to one’s own criminal record available *at no cost*. Without access to their own criminal records from the state repository (and with many unemployed residents unable to pay the \$40.66 fee to Identogo), many residents don’t know their records are incorrect or incomplete until it’s too late.

2. Reclassify pre-conviction records (such as arrest logs, booking photos, and charging documents) as confidential until a criminal conviction. This would be similar to the privacy protections that already govern juvenile records and grand jury targets in many states. This

would prevent commercial third parties from duplicating and disseminating pre-conviction data that resides on the Internet indefinitely.

3. Regulate criminal record data and background check companies. The state should only allow consumer reporting agencies to operate in New Jersey that routinely update records with expungement orders served by the state (not the petitioner). Data quality must be improved.

The changes brought by new technologies in this context cannot be understated. Online records pose major difficulties for New Jersey's expungement and "Opportunity to Compete" legislation that has placed restrictions on employers' use of a job applicant's criminal record during the hiring process. Although these efforts, like many "Ban the Box" movements across the nation, are critically important, the wide availability of records that are released online undermines these legislative efforts if employers conduct clandestine online searches without notifying the applicant. Thus, these ever-important records — though they may be incorrect or legally sealed — continue to exert considerable power over individuals' work opportunities.

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